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No. 86-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY PIERCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

As shown in more detail below, the government's Opposition is more notable for what it concedes than for what it disputes on each of the two, independent issues which Petitioner maintains merit review by this Court. As to the first issue of the adequacy of the hearing by the district court, the government admits that the district court relied solely on the parol evidence rule—a common law principle designed for use in commercial contract cases—to truncate the Petitioner's statutory and Due Process right to prove that he had "just cause" under 28 U.S.C. § 1826(a) for declining to testify. This ruling not only denied Petitioner a *meaningful* opportunity to present his *defense* to the civil contempt charge, but also evidence which, even if sufficient to constitute a defense, would have gone to mitigating the severity of punishment. This Court long ago established that an

accused contemnor always should be heard for the separate purpose of mitigation. (Pet. at 12-13.)

Regarding the second issue raised in the Petition, the mandate in § 1826(b) that "[a]ny appeal" brought under it must be disposed of within thirty days, the government agrees that "there is conflict among the circuits" on how to properly interpret this language. (Opp. at 9.) Unable to deny its existence, the government is forced to argue that this conflict "is unimportant . . . ." (*Id.* at 10.) In fact, these differing interpretations mean that individuals will be subject to varying periods of confinement while they appeal a finding of contempt. Not only is it axiomatic that issues pertaining to personal confinement are always "important" in our judicial system, the fact that Congress has seen fit to address this issue expressly by statute itself rebuts the government's claim that the issue is "unimportant."

I. THIS COURT SHOULD DETERMINE WHETHER COMMON LAW CONTRACT PRINCIPLES MAY OVERRIDE A CITIZEN'S STATUTORY AND CONSTITUTIONAL RIGHT TO A FULL AND EFFECTIVE OPPORTUNITY TO EXPLAIN THE REASONS FOR DECLINING TO TESTIFY

The government nowhere disputes that Petitioner Pierce was entitled here to a full and fair hearing covering all important issues.[1] Instead, the government contends that Mr. Pierce's grounds for not testifying were

[1] The fact that the Court of Appeals "consider[ed]" an affidavit by Petitioner's attorney (Opp. at 8)—filed only as part of the *appellate* record—is hardly the same as a full and "vigorous debate" on the issues at the trial level. If that were the case, then every hearing required by due process could be eliminated through filing affidavits and appellate courts would essentially become triers of fact. Moreover, Petitioner continues to find ironic the government's use of certain selected extrinsic evidence in seeking affirmance on appeal after it successfully moved to preclude all extrinsic evidence proffered by Mr. Pierce below.

"fully considered" by the district court. (Opp. at 7.) This simply misstates the record. The district court considered only the written plea agreement while—at the government's urging—it expressly excluded any testimony concerning the meaning of the disputed provision in the plea agreement or any representations made to Pierce concerning whether he would have grounds for not testifying in future cases.[2] This result—even if based on a correct statement of contract principles, which Petitioner still maintains it is not[3]—exalts a principle of contract interpretation above an individual's statutory and Due Process right to an "uninhibited adversary hearing," and is a sharp break from the standard established by this

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[2] This ruling directly contradicted the district court's own prior observation that, if Mr. Pierce was going to be subject to civil contempt, then "certainly he ought to be present to present his side of it." (Pet. App. A27.) However, when Mr. Woll, Petitioner's attorney at the subsequent hearing, attempted to develop the background of the plea agreement, the Court cut off this entire line of inquiry by stating: "[n]ow we are taking the position that we are bound by the plea agreement and we are proceeding from there." (Pet. App. A36.)

[3] Not only is the disputed provision in the plea agreement certainly ambiguous, the better reasoned, increasingly adopted approach is to permit extrinsic evidence in all cases—an approach that is all the more appropriate when a citizen's liberty is at stake. *See generally* 3 Corbin on Contracts § 536 (1960):

> [I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract . . . seldom . . . convey one identical meaning to the two contracting parties or to third persons. Therefore, it is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects and the events to which the words can be applied and which caused the words to be used.

Court and several lower courts.[4] Put differently, this case is not, as the government suggests, a simple contract dispute between two parties, but a contempt proceeding brought by the U.S. government under a federal statute that resulted in the confinement of the Petitioner after his proffered testimony on the key issue in the case was disallowed. As such, it clearly raises substantial issues worthy of review by this Court.[5]

Finally, even if Petitioner's position regarding his reasons for not testifying would not have constituted a cognizable *defense* to a contempt charge, this Court has held that the right to a full and fair hearing also exists to offer the accused an opportunity to show "extenuation

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[4] As noted in the Petition (at 10), this Court time and again has held that an accused contemnor must "have a reasonable opportunity" to answer contempt charges against him so that he may "meet them by way of defense or explanation" (*In re Oliver*, 333 U.S. 257, 275 (1948)), and that "[i]f justice is to be done, a sentencing judge should know all the facts . . ." (*Harris* v. *United States*, 382 U.S. 162, 166-67 (1965)). Taking the lead in applying these precepts from criminal contempt to the civil contempt statute, 28 U.S.C. § 1826, the Ninth Circuit first held in *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) that the " 'uninhibited adversary hearing' recognized by *Harris*" as essential to contempt proceedings "means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues."

[5] *See Ingraham* v. *Wright*, 430 U.S. 651, 673-74 (1977) (holding that the "contours of this historic liberty interest in the context of our federal system . . . always have been thought to encompass freedom from bodily restraint and punishment" and that it is "[f]undamental that the state cannot hold and physically punish an individual except in accordance with due process of law"). Or, as Justice Marshall, joined by Justices Brennan and Stevens, reminded recently: "If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint. [Citations]. Only a very important government interest can justify deprivation of liberty in this basic sense." *Schall* v. *Martin*, 467 U.S. 253, 104 S.Ct. 2403, 2423 (1984) (dissenting opinion).

of the offense and mitigation of the penalty imposed . . . ." *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). *See also United States* v. *Gravel*, 605 F.2d 750, 752 (5th Cir. 1979) (per curiam). Thus, even if the district court was correct that under contract principles Pierce had no "defense" to a charge of contempt, its ruling also denied Pierce any opportunity to establish that his punishment should be mitigated. The government nowhere even addresses this troubling aspect of the ruling below, let alone demonstrates that the long-settled right of an accused contemnor to provide evidence on "mitigation" should now be eliminated under a statute that is being increasingly used.

II. THE ADMITTED CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER APPLICATION OF THE THIRTY-DAY RULE IN 28 U.S.C. § 1826(b) RAISES A SUBSTANTIAL ISSUE WHICH SHOULD BE RESOLVED BY THE COURT

As noted at the outset, the government also admits in its Opposition that "there is a conflict among the circuits on the interpretation of 28 U.S.C. 1826(b)" relating to the consequences when a court of appeals fails to decide an appeal within the thirty days mandated by the civil contempt statute. (Opp. at 9.) The government then details for more than a page just how fractured the interpretation of § 1826(b) has recently become, explaining that the Second and Eighth Circuits view the thirty-day period as mandating release if the appeal is not decided within that time; the Tenth Circuit says courts lose jurisdiction entirely at the end of thirty days; the Fifth Circuit expressly extends the time once thirty days have run; the First and Third Circuits "apparently" surreptitiously use the same approach as the Fifth Circuit; the Seventh Circuit has extended the thirty days by measuring the time from when the contemnor files

his brief and not, as the statute says, "from the filing of such appeal"; and now the District of Columbia Circuit has created an approach of its own which the government characterizes as "functionally equivalent" to that taken by the First, Third, and Fifth Circuits. (Opp. at 9-10.)

The government would excuse these widely disparate holdings by arguing, first, that conflicting interpretations of § 1826(b) have "existed since the mid-1970s . . . ." (Opp. at 10.) Yet, the burgeoning caselaw which the government itself cites shows that these conflicts have rapidly expanded since 1982, and the D.C. Circuit's 1986 opinion here has now *expressly*—in contrast to any previous so-called "functionally equivalent" decisions—sharply drawn the conflict among the courts of appeals. Moreover, and as pointed out in the Petition (at 1), commentators have noted the "dramatic increase" in the use of the civil contempt sanction, and thus this conflict will have an increasing, substantial effect.

The government argues, second, that this admitted conflict is "unimportant" (Opp. at 10), adopting the Court of Appeals' circular analysis that the thirty-day limit in the *second* sentence of § 1826(b) was "apparently" intended to protect only contemnors with "substantial grounds for appeal" (Pet. App. A13) because the right to bail afforded by the *first* sentence of § 1826(b) provides that contemnors with meritorious appeals will be released. (Opp. at 12-13.) As an initial matter, issues of imprisonment are always "important" in our system of justice, as already noted. (*See supra* p. 4.) In any event, the government's interpretation of the thirty-day limit renders the second sentence of § 1826(b) wholly nugatory. Congress obviously placed the second sentence in § 1826(b) for a reason, and its specific command that "[*a*]*ny* appeal . . . shall be disposed of as soon as practicable, *but not later than* thirty days from the filing of such appeal" (emphasis supplied) thus should not be

rendered nugatory by the different relief offered by the separate bail provision of § 1826(b). As this Court has observed in a similar context:

> We cannot believe that Congress intended the general terms of § 3(8) to countermand the specific feasibility requirement of § 6(b)(5). We decline to render Congress' decision to include a feasibility requirement nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect.

American Textile Manufacturers Institute, Inc. v. *Donovan*, 452 U.S. 490, 513 (1981) (citations omitted). *See also Equal Employment Opportunity Commission* v. *Shell Oil Co.*, 466 U.S. 54, 72 (1984) (rejecting interpretation which "would render nugatory the statutory limitation" of the law at issue); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

Finally, the government's reliance on the Speedy Trial Act is misplaced (Opp. at 12), since it only suggests that Congress favors release once a prescribed period of time for deciding an issue has run. Certainly the interpretation of § 1826(b) provided by the Second and Eighth Circuits, whereby alleged contemnors are released pending disposition of their appeals once thirty days have elapsed, is more consistent with the Speedy Trial Act than is the District of Columbia Circuit's reading that results in there being no significance whatsoever to exceeding the express thirty day period prescribed by Congress. Moreover, it is clear that the protection of the Speedy Trial Act applies in all cases *regardless* of the likely guilt of an individual, which is in sharp contrast to the D.C. Circuit's bald conclusion that unsuccessful appellants are not entitled to the benefit of the thirty-day limit of § 1826(b).

CONCLUSION

Petitioner is mindful that the views of the Solicitor General are often given considerable weight in deciding whether a case warrants the grant of certiorari. But that should not be the case when the Solicitor General speaks as a litigant. Moreover, the government's Opposition here seeks to demonstrate only that the district court's decision was correct. While Petitioner has himself demonstrated that there are substantial grounds for overturning the decisions below, the critical issue at this juncture is whether this Court should undertake to review those decisions. On that issue the government's Opposition only supports a grant of certiorari because it freely admits that the case "is not moot" (Opp. at 6), that there is a "conflict among the circuits" (Opp. at 9), and that the district court relied on the parol evidence rule to exclude the live testimony proffered by Petitioner concerning why he declined to testify (Opp. at 8). Given these concessions and the fact that the case presents issues of personal confinement under an increasingly used federal statute, this case clearly warrants review by this Court.

Respectfully submitted,

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